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No. 82-1477

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Pacific Standard Life Insurance Company
and Graham Beach Partners,

Appellants,

v.

Committee to Save Nukolii, County of Kauai
and Eduardo E. Malapit, in his capacity as
Mayor of the County of Kauai,

Appellees.

On Appeal from the Supreme Court of Hawaii

RESPONSE TO PROPOSED AMICUS BRIEFS

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April 8, 1983

RESPONSE TO PROPOSED AMICUS BRIEFS

The Committee to Save Nukolii (hereinafter "the Committee"), Appellees in this action, oppose each of the aforementioned motions for leave to file an amicus curiae brief, and submit that both motions should be denied. Because the same defects appear in each proposed brief, this response will deal with them jointly.¹

Premature:

The proposed amicus briefs are of no utility to the Court because they are premature. They discuss no issues relevant to the threshold question of whether or not this Court should even consider the case. Neither of the proposed amici even addresses the fact that the decision below is not a

¹ The motion of National Association of Realtors (hereinafter "Realtors") fails to state that Appellee Committee refused consent to filing of their brief. Rule 36(1) of the Supreme Court Rules provides that a "motion for leave to file such a brief when consent has been refused is not favored." Appellees oppose the filing of any amicus briefs at this stage of the litigation.

final judgment (because it requires further extensive proceedings) or the admitted fact that no purported federal question was ever raised in any court below until after a decision of the highest state court. The proposed briefs do not discuss the fact that the decision below rests on dispositive state grounds nor do they deal with numerous factual determinations made directly counter to appellant's assertions.

Hypothetical:

Second, the statement of the issues (and the arguments which follow) contained in each of the proposed briefs have nothing to do with this case. The brief deals with hypothetical questions and policy arguments which are in no way presented by the case below. For example, the "Question Presented" in the proposed amicus of National Association of Home-builders, etc. starts by assuming "vested" rights. Yet the court below found that under the facts of the case, Appellant/Petitioners had failed to prove any of the four elements

required to establish a vested right under longstanding Hawaii law. Similarly, the proposed brief of Realtors rests on "reasonable investment-backed expectations", but the Hawaii courts found as facts that there were no such expectations in this case, that any expenditures were "speculative" (App. at A-21), that the Developers' own contracts showed that they knowingly undertook "business risks" (App. at A-24), and that the Developer not only did not rely, but proceeded in bad faith (App. at 15-16, -20, -24).

Hawaii Landownership Unique -- 72 Landowners:

Third, both proposed amici are irrelevant because they utterly fail to deal with the unique nature of Hawaii property ownership. It is estimated that over 95% of privately owned Hawaiian land belongs to only 72 landowners. See Midkiff v. Tom, No. 80-4368, Mar. 28, 1983 (9th Cir.) p. 18. By contrast, 64% of all Americans own their own homes and many who are not homeowners own land. Out of this unique Hawaii land structure has

developed a complex framework which must necessarily take into account a society in which the overwhelming majority of citizens do not and cannot own land. As opposed to the rest of the nation, Hawaiians have effective access to just one major "property" right: the right to vote. Accordingly, the Hawaii Supreme Court decision must be viewed in light of this and other very special local circumstances (such as the fact that the land in question was acquired by Appellants as agricultural). The proposed amici, which fail to take this into account, present hypothetical discussions which have no relation to the procedural or substantive realities of this case.

Misleading "Facts"

Finally, both amici are affirmatively misleading as to the facts. They try to make this case sound as if a Developer had virtually completed a project, only to find that the zoning had been changed. On the contrary, this case, as the record amply

shows, is one where virtually all construction took place and most expenditures were made after the referendum passed and the case had been appealed to the Hawaii Supreme Court. Referenda aside, building after a case has been submitted to a state Supreme Court and while awaiting a decision from that Court is a gamble, and can hardly be described as an "expectation" without doing considerable violence to both language and policy. As the Court recognized, this was a calculated and bad faith attempt to create a fait accompli and not an investment-backed "expectation" by any definition.

The argument which the moving parties seek to make is a straw man. It hypothesizes an ideal issue which this Court might someday wish to decide, constructs abstract statements about what the Hawaii Supreme Court might have held if different facts had been presented to it, and then proceeds to argue on that basis.

The extent to which the discussions in

the proposed amicus briefs deviate from anything remotely presented in the instant case is also illustrated by their assumption of a national land use system. Such a system has never existed and would be unworkable in the extreme, particularly in Hawaii due to its oligarchical land ownership. Moreover, it would represent the most extraordinary sort of intrusion into the historical province of the states.

Amici briefs to the United States Supreme Court should be genuinely helpful. They should not mislead the Court into thinking the case is a different one than the case which in fact was decided below. The proposed amici do not meet this minimum criterion.

In any event, leave to file amicus briefs before the highest Court in the country are not and ought not to be lightly granted, as the Court Rules recognize, especially before the Court has given any indication that it has any interest in

hearing the case. Counsel for Appellees have also been contacted by groups with an interest in filing amicus briefs supporting the position that the decision of the Hawaii Supreme Court is one of extremely limited circumstances, and rests upon the very unusual facts of a developer not in good faith obtaining permits on the day before the referendum and upon which permit they did not genuinely rely. Appellees have suggested that such groups not file any such briefs because they would be premature at this stage of the litigation and would unduly add to the Court's already considerable workload. Appellees believe that the same reasoning applies to the amicus briefs solicited by Appellant.

DATED: April 8, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this RESPONSE TO PROPOSED AMICUS BRIEFS upon Appellant and Appellees pursuant to Supreme Court Rule 28 by placing three copies in the U.S. Mail with first class postage prepaid, addressed to:

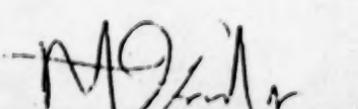
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Done this 10th day of April, 1983 at San Francisco, California.


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